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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-504

SAL MARRA,

Petitioner

v.

STATE OF WEST VIRGINIA

Respondent

**RESPONSE TO PETITION
FOR WRIT OF CERTIORARI**

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Respondent, The State of West Virginia, respectfully prays that a writ of certiorari be denied the petitioner who has heretofore filed a petition to review the judgement of the Supreme Court of Appeals of West Virginia entered on June 27th, 1978.

OPINION BELOW

The Supreme Court of Appeals of West Virginia denied the petitioner's petition for writ of error and supersedeas by Order entered June 27th, 1978, and therefore this matter is without opinion from the Court below.

QUESTIONS PRESENTED

1. Did the Circuit Court of Hancock County, West Virginia, abridge the petitioner's Sixth and Fourteenth Amendment rights by denying the petitioner's motion for change of venue?
2. Is a defendant in West Virginia denied equal protection of the law for reason that an appeal does not lie as a matter of right in a criminal prosecution?

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

Sixth and Fourteenth Amendments; W.Va. Code, Ch. 58, Art. 5, Section 1,3,4,and 10.

STATEMENT OF THE CASE

As indicated in the petitioner's petition for writ of certiorari, the petitioner was indicted at the September, 1976 term of the Circuit Court of Hancock County, West Virginia, for sale and delivery of two (2) pounds of marijuana, a felony. Petitioner was tried and convicted by jury verdict in June, 1977. Petitioner's motion for a new trial on grounds of alleged error was granted by the Circuit Court and petitioner was retried and convicted by jury verdict in September, 1977. Between petitioner's first and second trial, petitioner filed a motion for change of venue alleging existence of a general hostile attitude against him among the citizens of Hancock County.

After having heard the testimony of numerous witnesses called by the petitioner, and as well the cross-examination of said witnesses by the State of West Virginia, the Circuit Court of Hancock County, after deliberation and comment, denied the petitioner's motion.

The testimony surrounding petitioner's motion for change of venue generally was that the petitioner had a bad reputation in Weirton, West Virginia, (the largest city in Hancock County) for failure to meet his financial obligations timely. Most witnesses called by the petitioner stated that petitioner enjoyed a reputation for an unwillingness to meet his financial obligations when the same became due. A number of witnesses recalled that the petitioner had been granted immunity from prosecution in return for his testimony against members of the Weirton Police Department who, along with the petitioner, perpetrated the crime of breaking and entering a jewelry store in Hancock County, West Virginia, in 1971. A Weirton police officer and petitioner were apprehended at the scene of the breaking and entering and were arrested. The Weirton police officer ultimately pleaded guilty to the crime of breaking and entering and was sentenced to confinement in the West Virginia Penitentiary for not less than one (1) year nor more than ten (10) years.

The petitioner turned State's evidence against three (3) other police officers allegedly involved as accessories before the fact and ultimately two (2) of the the three (3) police officers were acquitted by jury trial and one (1) convicted. Nevertheless, the petitioner contended that his testimony and grant of immunity by the Courts resulted in a hostile attitude toward him by the citizens of Hancock County.

Although the jury in both of petitioner's cases deliberated for short periods of time, the State's evidence against the petitioner in the trial Court below was overwhelming. Three (3) adult witnesses who allegedly purchased the marijuana from the petitioner testified in great detail as to the time, place and manner of the sale. In addition, entrapment was never raised or made an issue in the trial court and the only issue to be resolved by the jury was the credibility of witnesses. As an addendum and not legal argument, it is interesting to note that the petitioner testified during his first trial and decided against testifying at his second

trial.

REASON FOR DENYING THE WRIT

I. The granting of the petitioner's motion for change of venue is within the sound discretion of the trial court.

Although the Sixth Amendment to the Constitution of the United States provides a right to speedy trial by an impartial jury, the issue of an impartial jury is in the sound discretion of the trial Court.

Under West Virginia law the burden is upon the prisoner to show good cause for the change of venue. *State v. Beale*, 104 W.Va., 617, 141 S.E. 7 (1927). An application for change of venue in a criminal case is addressed to the sound discretion of the trial judge and the facts in support of a motion for change of venue must exist at the time the application is made. *State v. Wilson*, 202, S.E. 2d, 828 (1974).

The Supreme Court of the State of West Virginia was held in *State v. Riley*, 151 W.Va. 364, 151 S.E. 2d, 309 (1966) and *State v. Dandy*, 151 W.Va. 547, 153 S.E. 2d 507 (1967) that a general hostility throughout the County must exist against the defendant at the time of his application for change of venue which would deny the defendant a fair trial. When the veniemen were questioned by the trial court immediately preceding the commencement of the trial, all twenty (20), prior to striking, admitted under oath that they were unaware of any personal bias for or against the defendant and that they were unaware of any of the defendant's prior actions, either criminal or civil. After questioning by both counsel for the State of West Virginia and the petitioner, the Court was satisfied that the twenty (20) jurors were qualified to serve at the petitioner's trial.

The record below is abundantly clear that the twelve (12) petit jurors at both the petitioner's first and second trial were free of

any bias or prejudice for or against the petitioner and convicted the petitioner solely on the facts presented at the petitioner's trial.

II. Was the petitioner denied equal protection of the law because the State of West Virginia does not provide an accused with an appeal as a matter of right?

West Virginia appellate procedure in criminal cases requires ex parte petition for a writ of error. Thereafter, the Supreme Court of Appeals of West Virginia, in its discretion, determines whether to grant or deny the application. If application is denied, the matter is concluded by entry of order reciting the denial.

Although the petitioner cites several cases in his petition dealing with the right of appeal, none of the same have squarely held that to deny a defendant an automatic right of appeal deprives him of equal protection of the law. Although the respondent agrees that indigent defendants should be provided with counsel, transcripts and other aids to facilitate an appeal, it is submitted that it is not unconstitutional for a State not to provide a defendant with an automatic right of appeal to the highest court within the borders of that particular State. In West Virginia, the only appellate court beyond a circuit court is the West Virginia Supreme Court of Appeals. There are no intermediate courts and therefore a jury verdict in a Circuit Court is appealable only to the Supreme Court.

It is submitted that if a defendant is provided access to the Supreme Court by petition for writ of error, which he is in West Virginia, and the Supreme Court refuses ex parte the petitioner's written petition and the law in support thereof, which the Court does, that the petitioner has not been deprived of any constitutional safeguards. Actually, the petitioner enjoys a much better position in West Virginia in that his petition is heard ex parte by the Court before granting or denial and therefore the Court is in a position to review and study those cases and statutes and conclusions most favorable to the petitioner's position as cited by his counsel. It is submitted that if the Court then feels that the

prayer of the petition should be denied, it has in fact afforded the petitioner an opportunity to persuade the court to hear the matter in full argument.

It is submitted that in the interest of time and justice, the appellate procedure in criminal cases followed by the State of West Virginia is more favorable to the appellant than the procedures followed in States which require appearance, arguments and briefs by both the State or commonwealth and the defendant.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully Submitted,
ROBERT G. ALTOMARE
PROSECUTING ATTORNEY FOR
HANCOCK COUNTY, WEST VIRGINIA
 3401 Pennsylvania Avenue
 Weirton, West Virginia 26062

CERTIFICATE OF SERVICE

I, Robert G. Altomare, Prosecuting Attorney for Hancock County, West Virginia, as counsel for the respondent, hereby certify that, on the day of November, 1978, I served three (3) copies of the foregoing Response to Petition for Writ of Certiorari upon the petitioner by depositing same in a United States mailbox, with postage prepaid, addressed to counsel of record for the petitioner, Leo Catsonis, Catsonis and Linkous, 205 Security Building, Charleston, West Virginia 25301; and Leonard Z. Alpert, 3167 Main Street, Weirton, West Virginia, 26062. I further certify that all parties required to be served have been served.

**ROBERT G. ALTOMARE
PROSECUTING ATTORNEY FOR
HANCOCK COUNTY, WEST VIRGINIA**